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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MELISSA EILEEN BEAMAN,

Defendant and Appellant.

B205286

(Los Angeles County  
Super. Ct. No. SA052177)

APPEAL from an order of the Superior Court of Los Angeles County, Edward B. Moreton, Jr., Judge. Reversed.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

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The issue in this case is whether the trial court had lost jurisdiction due to expiration of defendant's probationary term by the time it issued a probationary order. Whether it did or not depends on whether the trial court had revoked probation at a particular hearing. If it had, the probationary period was tolled from that time until it was reinstated, and the court retained jurisdiction; if it had not, the court was without jurisdiction to make the order challenged on this appeal. The purported revocation of probation is based on the court's oral pronouncement, "OK. O.R. is revoked" followed by an order issuing a bench warrant and setting bail. We conclude that this was not an order revoking probation, so that the court had lost jurisdiction when it made the challenged order.

### **FACTUAL AND PROCEDURAL SUMMARY**

The essential facts are undisputed, although their meaning is not. A criminal complaint was filed against appellant, Melissa Eileen Beaman, on April 13, 2004, for possession of cocaine, a felony violation of Health and Safety Code section 11350, subdivision (a). The disposition of her case was by plea and placement in a probation program pursuant to the Substance Abuse and Crime Prevention Act (Pen. Code, § 1210.1 et seq., adopted by Proposition 36 in 2000; all further statutory references are to the Penal Code). Her probationary term was 36 months, running from June 30, 2004. Her performance on probation under that program was rocky. Probation was revoked and reinstated several times for various reasons, including failures to appear, dismissal from a treatment program, and a new narcotics arrest. At a hearing on April 18, 2005, at which she failed to appear but was represented by appointed counsel, it was reported that she had been discharged out of a narcotics treatment program. The reported proceeding concluded with the court's statement, "So O.R. is revoked. Bench warrant to issue, \$199,000."

Later the bench warrant was recalled, probation was revoked, then reinstated, and bench warrants issued and recalled. Finally, on November 26, 2007, appellant appeared for a trial phase progress report and probation violation hearing. The court announced

that it had a report that appellant was in compliance and that it intended to advance her to the “first phase.” At that point her attorney said she thought appellant’s probation had expired so that the court no longer had jurisdiction over the case. She asked for a determination of that issue. The court recessed, then heard argument on the point. It then stated that it had read the authorities cited by the parties, that it found *People v. Broadway* (1981) 123 Cal.App.3d Supp. 19, upon which appellant relied, distinguishable and *In re Torres* (1948) 86 Cal.App.2d 178, on which the prosecutor relied, more on point. The court concluded that the judge who made the earlier ruling (quoted above), had intended to, and had in fact, revoked probation, thereby tolling running of the probationary period. The court added that, in case it was not explicit, appellant’s probation “was revoked on April 18th, 2005, and it’s been reinstated.” The court calculated that appellant had two and one-half years remaining on her probationary period.

Appellant was ordered to report to her probation officer that afternoon, and to the program the following day. A return appearance also was ordered.

This timely appeal followed.

## **DISCUSSION**

Section 1203.2, subdivisions (a) and (b) authorize trial courts to revoke probation at any time during the probationary period. “The revocation, summary or otherwise, shall serve to toll the running of the probationary period.” (§ 1203.2, subd. (a).) As we have stated, it is undisputed that, unless the trial court’s April 18, 2005 order effected a revocation of probation, the three-year probationary period had expired before the November 26, 2007 hearing, even after recognizing the effects of other tolling that occurred as a result of revocation orders. We turn to whether the April 18, 2005 order amounted to a revocation of probation so as to toll the running of the probationary period.

Respondent relies on *In re Torres* to argue that it does, and particularly on language in that case that a valid revocation order does not require that the words “revoked” or “terminated” be used. (86 Cal.App.2d at p. 180.) *Torres* is

distinguishable. In that case the trial court had imposed a sentence of six months in county jail, of which five months were suspended. The defendant was ordered to serve 30 days, which he did. A subsequent minute order reflected that defendant “[p]leads guilty to violating the terms of probation” and it was “therefore ordered and adjudged” that he serve five months in county jail. (*Id.* at p. 179.) As the reviewing court summarized, the trial court’s order was that the defendant be imprisoned for the remaining five months. It committed him accordingly. “Where a violation of the terms of an order of suspension or probation is determined as a fact in open court after notice, and an order is ‘therefore’ made sending a defendant back to jail to serve the remainder of the term originally provided for, it would seem that it affirmatively appears that the suspension or probation has been revoked or terminated.” (*Id.* at p. 180.)

*Torres* teaches that when a defendant is adjudicated to have violated probation and is ordered imprisoned for the remainder of a sentence already imposed and suspended (or, we assume, for the maximum time permitted by law if sentence had not been pronounced before), probation must be considered to have been revoked as a matter of law, even if the words “revoked” or “terminated” are not used. The reason is that such an order exhausts the punishment that could be imposed, making it “affirmatively appear” that a revocation has occurred. (*In re Torres, supra*, 86 Cal.App.2d. at pp. 180-181.)

That is not what happened in this case. Nor is it what happened in *People v. Broadway*, in which a bench warrant issued for a defaulting probationer’s arrest, and in which the reviewing court made a similar distinction of *Torres*. (*Broadway, supra*, 123 Cal.App.3d Supp. 23.) The court quoted the statute, and observed that it “does not require that the [trial] court revoke probation in order to issue the warrant, or that the issuance of a warrant constitutes an automatic revocation of probation. In the present case, the clerk’s docket shows only the issuance of a bench warrant, with nothing from which one could find an indication that the court also ordered revocation of probation.” (*Ibid.*)

The clerk’s entry in this case is similar:

“Defendant failed to appear

“O.R. revoked.

“Bench warrant to issue.

“.....

“04/18/05 bench warrant in the amount of \$199,000.00 by order of Judge Deborah Christian ordered/issued. (04/18/05).”

The effect of an order revoking “O.R.” (own recognizance, which is release without bail) is that defendant is at liberty without posting security to assure a later appearance. The order revoking own recognizance status generally is accompanied by a bench warrant for the defendant’s arrest, and a stated amount of bail the defendant would have to post in order to gain release. What it does not do, without more, is revoke probation. If the court wishes to make that order, it must say so or, as in *Torres*, make an order that indisputably reflects the fact that probation is terminated. There was no such order in this case.

Since the period of probation had run, the court was without jurisdiction to impose further probationary orders.

### **DISPOSITION**

The appealed order is reversed.

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EPSTEIN, P.J.

We concur:

WILLHITE, J.

MANELLA, J.